(5)

No. 96-1971

In The

Supreme Court of the United States

October Term, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK OF LOUISIANA, WALTER L. BROWN, JR., PERRY S. BROWN and FOUNTAINBLEAU STORAGE ASSOCIATES

Respondents.

On Writ Of Certiorari To The Fifth Circuit Court Of Appeals

RESPONDENTS' BRIEF ON THE MERITS

CHARLES L. STERN, JR.*
Counsel for Respondent Fountainbleau Storage Associates
STEEG and O'CONNOR, L.L.C.
201 St. Charles Ave., Suite 3201
New Orleans, Louisiana 70170
(504) 582-1199

JOHN M. LANDIS
STEPHANIE D. SHULER
Counsel for Respondent Regions Bank of Louisiana
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON, L.L.P.
546 Carondelet Street
New Orleans, Louisiana 70130-3588
(504) 581-3200

MICHAEL H. RUBIN
Counsel for Respondents Walter L. Brown, Jr. and Perry S. Brown
McGLINCHEY STAFFORD, a Professional Limited Liability Company
One American Place, 9th Floor
Baton Rouge, Louisiana 70825
(504) 383-9000

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

66 pp

QUESTION PRESENTED

Where a claim, filed in state court and asserted by plaintiffs to arise solely under state law, is precluded by a prior federal judgment on a matter of federal law, can the case be removed from state court on the ground that the purported state law claim is in fact an artfully pleaded federal one?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATE CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND RULES

STATUTES

TABLE OF AUTHORITIES – Continued

RULES:

TABLE OF AUTHORITIES – Continued

LOUISIANA STATUTES AND CODAL ARTICLES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

RESPONDENTS' BRIEF ON THE MERITS

Respondents, Fountainbleau Storage Associates, Regions Bank of Louisiana, Walter L. Brown, Jr. and Perry S. Brown, request that this Court affirm the decision of the Fifth Circuit Court of Appeals dismissing petitioners' claims against them with prejudice.

STATEMENT OF THE CASE

I. Introduction

The petitioners filed an action in Louisiana state court seeking to foreclose upon a mortgage nearly a decade after the entry of two bankruptcy court orders, from which no appeal ever has been taken, authorizing and subsequently confirming the sale of certain property "free and clear" of the same mortgage. R. 4-75; Jt. App. 12-34. Although petitioners were aware of the bankruptcy court orders and of the sale made in accordance with their provisions, their state court pleadings deliberately avoided any reference to the bankruptcy proceedings. In response to petitioners' attempt to relitigate in state court a matter already tried to and the subject of two final orders of the bankruptcy court, the defendants in the state court suit removed the matter to federal district court pursuant to 28 U.S.C. § 1441(b) under the authority of *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). Both the district court and the court of appeals held that removal was proper under *Moitie* and that the suit should be dismissed under principles of claim preclusion in light of the bankruptcy court orders. This Court granted certiorari to review whether the case had been properly removed, the only issue presented by the petition for certiorari.

II. Statement of Facts

In 1957 Lois Stern leased a tract of property located in New Orleans, Louisiana to Pelican State Hotel Corp. R. 484. Pelican's interest in the lease ("Leasehold Estate")[1] was transferred on several occasions, finally being acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. R. 484-85. On the same date THILP granted a mortgage ("First Mortgage") on the Leasehold Estate to secure a $15,000,000 collateral mortgage note, which in turn had been pledged to secure a loan from First Financial Bank ("FFB").[2] R. 504; Jt. App.

---

[1] As the Fifth Circuit noted, the term "leasehold estate" is foreign to a civil law jurisdiction such as Louisiana. *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576, 580 n. 2 (5th Cir. 1997); Jt. App. 50 n. 2. Nonetheless, it has been used throughout this proceeding to refer to the rights granted to the lessee under the 1957 lease and has been adopted by the petitioners in their brief. Pet. Brief 5 n. 4. Respondents will follow that convention in this brief.

[2] The collateral mortgage package is a security device unique to Louisiana, with its origins in the Louisiana Civil Code. The collateral mortgage secures a collateral mortgage note, which in turn is pledged to secure an underlying loan, often represented by negotiable instruments ("handnotes") executed in connection with loan advances. The collateral mortgage note does not evidence the money advanced by the lender, but is a part of the package securing the advances represented by the handnotes. Thus, the holder of a collateral mortgage note may neither collect any funds from the borrower nor foreclose upon the collateral mortgage unless there is money owing on the underlying debt. *First Guaranty Bank v. Alford*, 366 So. 2d 1299, 1302-03 (La. 1978). *See generally* David S. Willenzik, *Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative*, 55 La. L. Rev. 1 (1994); Max Nathan, Jr. and Anthony Dunbar, *The Collateral Mortgage: Logic and Experience*, 49 La. L. Rev. 39 (1988).

16. A few months later, on May 2, 1984, THILP granted a second collateral mortgage ("Second Mortgage") on the Leasehold Estate to secure a $5,000,000 collateral mortgage note held by the petitioners, Edmond G. Miranne, Edmond G. Miranne, Jr., Mary Anna Rivet and Minna Ree Winer (collectively, "the Mirannes").[3] R. 511-18. Edmond G. Miranne, Jr. was a limited partner in THILP, holding a 71.5% interest in the partnership. R. 345.

THILP filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 5, 1984 in the United States Bankruptcy Court for the Eastern District of Louisiana. The THILP bankruptcy later was converted to a Chapter 7 proceeding, and a trustee was appointed. R. 519-20. In the spring of 1986 the trustee applied for bankruptcy court authority pursuant to 11 U.S.C. § 363(f) to sell the Leasehold Estate free and clear of all liens, including the Second Mortgage. In response to the application, the bankruptcy court issued an order dated April 18, 1986 advising all creditors and parties in interest opposing the sale to serve objections on the trustee by June 12, 1986 and setting a hearing on any objections that might be filed for June 16, 1986. Jt. App. 10-11. At the hearing, which was held as scheduled after "all creditors and parties in interest [had] been given the required notice [and] opportunity to object . . . ," Edmond G. Miranne, Jr. appeared as attorney for himself and his father. Jt. App. 12-13. On June 17, 1986, the day following the hearing, the bankruptcy court executed an order granting the sale application, stating expressly that the

---

[3] Mary Anna Rivet is married to Edward G. Miranne, and Minna Ree Winer is married to Edmond G. Miranne, Jr.

sale would be free and clear of the Second Mortgage. Jt. App. 13, 18.[4]

Although petitioners assert now that the procedure followed by the bankruptcy court in issuing the sale order was improper, Pet. Brief 6,[5] neither they nor any other interested party appealed from that order. On August 11, 1986, after expiration of the delays for appeal, the bankruptcy trustee held a public auction at which FFB, holder of the First Mortgage, submitted the only bid. The bankruptcy court approved the auction results and, by order dated August 14, 1986, directed that the sale proceed "free and clear of any and all liens and encumbrances" and ordered the Recorder of Mortgages for Orleans Parish to "cancel and erase all liens, mortgages and encumbrances bearing against the said property . . . ," including the Second Mortgage in favor of the Mirannes. Jt. App. 27-28, 32.[6] Pursuant to the August 14,

---

[4] The Second Mortgage was listed on Exhibit D to the sale order as Item 29, where it was described as "Collateral Mortgage in the principal amount of $5,000,000, before J.F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984." Jt. App. 18. A delay in recordation apparently accounts for the discrepancy between the August 17, 1984 date contained in this description and the May 2, 1984 date found on the face of the mortgage. R. 5.

[5] More specifically, they assert that the bankruptcy court should have required the trustee to institute an adversary proceeding pursuant to Fed. R. Bankr. P. 7001, *et seq.*, instead of allowing the trustee to proceed by motion under Fed. R. Bankr. P. 9013-14. The legal issues relating to this contention, which is both untimely and incorrect, are discussed *infra* at Section II(A)(2), pp. 40-42.

[6] For reasons that are unclear, the Recorder of Mortgages never has canceled the Second Mortgage from the public records. His failure to do so is of no moment if, as respondents contend, the mortgage has been rendered ineffective by the bankruptcy court orders, since recordation does not create any rights under Louisiana law. *E.g., Gibraltar Sav. F.A. v. First Mortg. Corp.*, 825 F. Supp. 746, 749 (M.D. La. 1993); *First Nat. Bank of Ruston v. Mercer*, 448 So. 2d 1369, 1376 (La. App. 2d Cir. 1984). Petitioners suggest at various points in their brief that the continued presence of the Second Mortgage on the public records of Orleans Parish somehow gives it independent life as a valid encumbrance against the property, notwithstanding contrary language in the bankruptcy court orders. Pet. Brief 7, 12-13, 42-49. That suggestion is completely at odds with Louisiana law, under which a mortgage is purely an accessory security interest, with no existence independent from an underlying principal obligation. La. Civ. Code Ann. arts. 3278-79, 3282. This point is discussed in more detail *infra* at Section II(B), pp. 47-49.

1986 order, from which, as with the June 17, 1986 order, no appeal ever was taken, the trustee formally conveyed the Leasehold Estate to FFB. R. 501-10.

Secor Bank eventually succeeded FFB as owner of the Leasehold Estate. On December 28, 1993 it acquired the underlying property from Walter L. Brown, Jr. and Perry S. Brown ("the Browns"), successors-in-interest to the original lessor, thereby extinguishing the lease as a matter of law. La. Civ. Code Ann. art. 1903. Later that day Secor conveyed the property in full ownership to Fountainbleau Storage Associates ("FSA"), its current owner. R. 181-85. Regions Bank of Louisiana ("Regions") is the successor to Secor.

III. The Proceedings Below

A year after FSA acquired the property, the Mirannes brought suit in Louisiana state court against FSA, Regions and the Browns, alleging that the December 1993 transactions, by canceling the lease and conveying the

property, had prejudiced their rights under the Second Mortgage. R. 4-12. The Mirannes made no reference in their state court pleadings to the 1986 bankruptcy court orders that, on their face, provided that the Second Mortgage ceased to encumber the property after August 14, 1986. Instead, alleging that the Second Mortgage was a currently valid encumbrance and implicitly treating it as unaffected by the bankruptcy court orders, they prayed for its recognition and enforcement against FSA's property or, alternatively, for damages. *Id.*

The respondents removed the state court action to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1441(b), asserting that petitioners' claims in fact arose under federal law, including 11 U.S.C. § 363(f), notwithstanding the deliberate omission of any reference to federal law in petitioners' state court pleadings. R. 117-21. Following removal, respondents sought summary judgment on the basis of, *inter alia*, claim preclusion, while the Mirannes moved that the case be remanded to state court for lack of subject matter jurisdiction. R. 403-08, 420-602. Relying primarily upon *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362 (5th Cir. 1995), the district court denied the motion to remand, granted summary judgment in favor of FSA and Regions on the basis of claim preclusion, and granted summary judgment in favor of the Browns on other grounds. Jt. App. 38-47.

The Fifth Circuit affirmed. *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir. 1997); Jt. App. 48-90. After reviewing the doctrine of artful pleading, particularly as it has been applied in instances of claim preclusion, the court of appeals held that this Court's decision in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), authorized

removal on federal question grounds "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law." *Id.*, 108 F.3d at 586 (*quoting Carpenter*, 44 F.3d at 370); Jt. App. 64. It found support for this jurisdictional rule in decisions from the Seventh and Ninth Circuits, which reasoned that under such circumstances the state court claim could be recharacterized as the original federal claim against which the prior judgment had been entered. *Id.*, 108 F.3d at 585-86, 591-92; Jt. App. 61-65, 77-79.[7] After articulating the applicable jurisdictional standard, the Fifth Circuit determined that the 1986 orders of the bankruptcy court precluded the Mirannes' lawsuit, which it characterized as a "transparent, 'second bite' collateral attack" on those orders, thus justifying both removal of the case and summary judgment dismissing it. *Id.*, 108 F.3d at 586-89, 592-93; Jt. App. 65-73, 81-82.[8]

---

[7] The Seventh and Ninth Circuit decisions cited by the court of appeals in support of this proposition include *Clinton v. Acequia, Inc.*, 94 F.3d 568, 571 (9th Cir. 1996); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 912 (7th Cir. 1993); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir. 1988); and *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374-76 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S. Ct. 150, 98 L. Ed. 2d 106 (1987).

[8] Although it found res judicata inapplicable to the claims against the Browns, the Fifth Circuit held that it could exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1367. It affirmed the grant of summary judgment in favor of the Browns because of the Mirannes' failure to establish any legal basis or triable issue of fact to support a claim against them. 108 F.3d at 592-93; Jt. App. 80-82. The Mirannes now concede that they have no personal claim against the Browns. Pet. Brief 4.

Judge Jones dissented. While agreeing generally with the majority's interpretation of *Moitie*, she asserted that removal was improper in this instance because, from her perspective, the Mirannes had no "essentially federal" claim from the earlier bankruptcy proceeding to recharacterize. *Id.*, 108 F.3d at 593-95; Jt. App. 83-89. Judge Jones viewed the petitioners' claim, "whether [they] proceeded in good faith or not," as purely a state law matter that should have been remanded to state court. *Id.*, 108 F.3d at 595; Jt. App. 89.

The Fifth Circuit rejected the Mirannes' request for *en banc* consideration. 114 F.3d 1185 (5th Cir. 1997). The Mirannes then filed a petition for writ of certiorari to this Court directed to the jurisdictional issue. The Court granted certiorari by order dated September 29, 1997. ___ U.S. ___, 118 S. Ct. 31, ___ L. Ed. 2d ___ (1997).

SUMMARY OF ARGUMENT

The scope of statutory federal question jurisdiction under 28 U.S.C. § 1331 and its companion removal provision, 28 U.S.C. § 1441, is narrower than the constitutional grant, which covers any suit that necessarily raises questions of substantive federal law at its outset. Statutory "arising under" jurisdiction is determined from the allegations of the plaintiff's well pleaded complaint. Thus, a federal defense to a claim grounded in state law does not confer federal jurisdiction, nor do allegations in a plaintiff's complaint made in an attempt to avoid or anticipate a federal defense. Instead, a suit arises under federal law for jurisdictional purposes only if there appears on the face of the complaint a substantial disputed question of federal law. As master of his complaint, a plaintiff therefore can avoid federal jurisdiction by choosing to base his action solely on state law, even if the allegations of the complaint could support a claim under federal law.

The Court has developed an "independent corollary" to the well-pleaded complaint rule when a plaintiff's claim, although it purports to be based solely on state law, necessarily arises under federal law. This "independent corollary" has been developed primarily in the context of federal preemption. In a series of four decisions – *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987); and *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) – the Court has held that under some circumstances the preemptive force of federal law displaces any conceivable state cause of action that a plaintiff may seek to assert, making the plaintiff's cause of action necessarily a federal one. In these circumstances, often described as "complete preemption," plaintiff's purported cause of action can be recharacterized as a federal (and hence removable) claim.

The Court's decision in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), authorizes removal on similar "artful pleading" grounds when a state court action is precluded by a prior federal judgment on a matter of federal law. In such instances any and all state law claims that were or could have been asserted in the prior federal proceeding have been extinguished – i.e., they have merged into the federal judgment and disappeared, leaving nothing upon which to base a suit in state court. Any purported state law claims filed in a subsequent state court action thus can be recharacterized as the same federal claim against which the federal judgment previously had been entered and, thus recharacterized, can be removed.

This case fits within the "artful pleading" rule established by *Moitie*. Petitioners triggered a contested proceeding before the bankruptcy court by objecting to the trustee's proposed sale of the Leasehold Estate "free and clear." In that proceeding they asserted that they had a valid mortgage against the property that the trustee wished to sell and litigated unsuccessfully whether, under 11 U.S.C. § 363(f), their mortgage would survive the public sale. Petitioners' current effort to foreclose upon that very mortgage can be recharacterized, in light of the merger and bar effects of claim preclusion, as a reenactment in state law garb of the contested proceeding generated by their sale objection before the bankruptcy court. Thus recharacterized, it becomes removable.

The jurisdiction rule of *Moitie*, as applied in cases such as the instant one, promotes substantial federal interests in the uniform operation of federal law and the integrity of the federal court system. It prevents manipulation of the dual court systems by a party unhappy with the outcome of federal court litigation and is consistent with the principles of federalism enunciated in decisions such as *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), particularly since injunctive relief, a far greater instrusion upon the sovereignty of state courts than removal, is available in instances of both claim and issue preclusion under the relitigation exception to the Anti-Injunction Act. Moreover, to the extent that *Moitie* authorizes a federal court to consider an aspect of the merits to determine its jurisdiction, it is no different from many of this Court's other jurisdictional holdings, which, in areas such as complete preemption, fraudulent joinder and the amount in controversy, require extensive consideration of merits issues as a component of the jurisdictional determination.

Petitioners' claims are barred by the prior bankruptcy court orders, establishing that both the exercise of removal jurisdiction and the ultimate grant of summary judgment in favor of respondents were proper. The bankruptcy court had jurisdiction over the contested proceeding generated by the objection to the trustee's sale application, and its orders must be treated as final judgments for res judicata purposes. Two of the petitioners participated by name in the bankruptcy proceeding, and they adequately represented the other petitioners' (in fact, their wives') interests, which were identical to their own. The petitioners' claims in the two proceedings each arise from the same "transaction," as that term has been defined for res judicata purposes, since the viability and enforceability of the Second Mortgage lies at the heart of both. Finally, the continued presence of the Second Mortgage on Louisiana's public records is irrelevant to the claim preclusion inquiry, since recordation is not a source of substantive rights under Louisiana law, but of notice only, and hence cannot undo the preclusive effect of the bankruptcy court's orders.

ARGUMENT

I. A Federal District Court Has Removal Jurisdiction Over a Lawsuit Asserting Claims Purportedly Based Solely on State Law If Those Claims Are Barred By a Prior Federal Judgment On a Question of Federal Law

A. Federal Question Removal Jurisdiction Must Be Determined Based Upon the Allegations of the Plaintiff's Well-Pleaded Complaint

Article III, Section 2 of the Constitution extends the judicial power of the United States to all cases "arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority." In an early decision written by Chief Justice Marshall, the Court interpreted this constitutional grant of "arising under" jurisdiction expansively.

> [I]t [is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction. . . .

Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 822, 6 L. Ed. 204 (1824). More recently the Court has reaffirmed that Article III "arising under" jurisdiction covers any suit that "necessarily raises questions of substantive federal law at the very outset. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S. Ct. 1962, 1971, 76 L. Ed. 2d 81 (1983).

Despite this broad grant of constitutional authority, Congress, with one short-lived exception,[9] did not grant the lower federal courts original jurisdiction over civil actions "arising under" federal law until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The language of the 1875 act, insofar as it concerns the original jurisdiction of the federal trial courts, has changed little to the present day, where it currently is embodied in 28 U.S.C. § 1331.[10]

---

[9] The exception was contained in the so-called "Midnight Judges Act," which granted the lower courts the power to hear cases commensurate with the constitutional grant. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92. It was repealed a year later. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

[10] The 1875 act gave federal trial courts original jurisdiction over "all suits of a civil nature . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . ," provided that the amount in controversy exceeded $500. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The jurisdictional grant in the current version of 28 U.S.C. § 1331 covers "all civil actions arising under the Constitution, laws, or treaties of the United States" and does not require a minimum amount in controversy.

Initially the Court construed the statutory language quite expansively, much as it previously had construed the constitutional provision from which the statutory phrasing had been adapted. For example, the opinion in *Robinson v. Anderson*, 121 U.S. 522, 524, 7 S. Ct. 1011, 1012, 30 L. Ed. 1021 (1887), suggested that a defense grounded upon federal law would sustain jurisdiction under the 1875 act. A year later, in *Metcalf v. City of Watertown*, 128 U.S. 586, 588-89, 9 S. Ct. 173, 174, 32 L. Ed. 543 (1888), Justice Harlan, writing for the Court, implied that a complaint that anticipated a federal defense, but that did not otherwise raise a federal issue, could fall within the scope of statutory "arising under" jurisdiction.

In the end, however, the Court recognized that the statutory grant of federal question jurisdiction, as opposed to the constitutional grant, must be "construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379, 79 S. Ct. 468, 484, 3 L. Ed. 2d 368 (1959). Accordingly, beginning with its opinion in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 14 S. Ct. 654, 38 L. Ed. 511 (1894), the Court has developed a set of limiting principles that have narrowed the scope of the statutory grant of "arising under" jurisdiction. *See Verlinden*, 461 U.S. at 495, 103 S. Ct. at 1972 (constitutional "arising under" grant broader than statutory grant under 28

U.S.C. § 1331). These limiting principles establish the general framework within which the instant case must be evaluated.

The foundation of that general framework has been dubbed the "well-pleaded" complaint rule:

> [W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, 103 S. Ct. 2841, 2846, 77 L. Ed. 2d 420 (1983) (*quoting Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S. Ct. 724, 724, 58 L. Ed. 1218 (1914)). Thus, the existence of a federal defense to a state law claim does not confer federal jurisdiction. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840-41, 109 S. Ct. 1519, 1521, 103 L. Ed. 2d 924 (1989). Moreover, notwithstanding suggestions to the contrary in *Robinson* and *Metcalf*, the lower federal courts lack jurisdiction over a case in which the complaint states a cause of action solely under state law, but further asserts either that federal law deprives the defendant of a defense that he might raise or that a purported federal defense is insufficient to defeat the claim. *Franchise Tax Bd.*, 463 U.S. at 10, 103 S. Ct. at 2846. This is so even if the only question presented for decision is raised by a federal defense. *Id.*, 463 U.S. at 12, 103 S. Ct. at 2847-48. Instead, a suit arises under federal law for purposes of 28 U.S.C. § 1331 only "if there appears on the face of the complaint

some substantial, disputed question of federal law." *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).[11]

Closely related to the well-pleaded complaint rule is the precept that the plaintiff is the master of his complaint. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716 (1913). The party who brings a suit determines the law upon which he will rely and can decide to forego a claim based upon federal law in favor of causes of action founded entirely upon state law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n. 6, 106 S. Ct. 3229, 3233 n. 6, 92 L. Ed. 2d 650 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced").

The same principles apply to federal question removal jurisdiction. Since 1887 a defendant has been able to remove an action from state court on federal question grounds only if the case is one that could have been brought originally in federal court. 28 U.S.C. § 1441.[12] A plaintiff thus generally may defeat removal by

---

[11] A case can arise under federal law, even if the only claims stated are grounded upon the law of a state, "where the vindication of a right under state law necessarily turn[s] on some construction of federal law. . . ." *Franchise Tax Bd.*, 463 U.S. at 9, 103 S. Ct. at 2846. This branch of "arising under" jurisdiction is not implicated by the instant case.

[12] The present version of § 1441 is closely derived from Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (corrected by Act of Aug. 13, 1888, ch. 866, 25 Stat. 434). *See* Charles A. Wright, *Law of Federal Courts*, § 38, at 224 (1994). The 1875 statute that created original federal question jurisdiction had authorized removal if either party claimed a right under the Constitution or laws of the

choosing to base his action solely upon state law, even if the allegations of the complaint could support a claim under federal law. *Caterpillar*, 482 U.S. at 392, 107 S. Ct. at 2429. Moreover, just as a plaintiff may not invoke original federal jurisdiction on the basis of an anticipated federal defense, a defendant may not remove an action from state court based upon an actual federal defense. *Oklahoma Tax Commission*. Only if the plaintiff, to secure the relief that he seeks, will be required to " 'establish both the correctness and the applicability to his case of a proposition of federal law,' " *Franchise Tax Bd.*, 463 U.S. at 9, 103 S. Ct. at 2846 (*quoting* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 889 (2d ed. 1973)), can the defendant remove the case to federal court.

B. This Court Has Developed an "Independent Corollary" To the Well-Pleaded Complaint Rule Authorizing the Federal Courts to Exercise Removal Jurisdiction When, As In the Instant Case, a Plaintiff's Claim Necessarily Arises Under Federal Law

1. Removal is Authorized Under Section 1441 When a Plaintiff's Purported State Law Claim Has Been Completely Preempted By Federal Law and Hence Can Be Recharacterized As a Federal Claim

The general framework discussed in the preceding section resolves the jurisdictional issue in the great majority of cases with little or no difficulty. However, the

---

United States. *Union & Planters' Bank*, 152 U.S. at 460, 14 S. Ct. at 656.

surface clarity of the cited jurisdictional principles dissolves in close cases, particularly those where the interplay between state and federal law makes the boundary between the two difficult to discern. To address these more difficult cases, the Court has developed an "independent corollary" to the well-pleaded complaint and master of the complaint rules – "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.*, 463 U.S. at 22, 103 S. Ct. at 2853.

This "independent corollary" has been developed primarily in the context of federal preemption. Federal preemption of state law ordinarily constitutes a defense; hence the alleged federal preemption of a claim grounded solely upon state law does not usually warrant removal under 28 U.S.C. § 1441(b). *Id.*, 463 U.S. at 13-14, 103 S. Ct. at 2848. Under some circumstances, however, the preemptive force of federal law displaces any conceivable state cause of action that plaintiff may seek to assert, making the plaintiff's cause of action necessarily a federal one. *Id.*, 463 U.S. at 23-24, 103 S. Ct. at 2853-54. The state court complaint, with its cause of action thus recharacterized, may be removed to federal court because it states a claim arising under federal law, whether or not such was the plaintiff's intent.[13]

---

[13] A court that recharacterizes the plaintiff's claim in this fashion arguably is breaching both the master of the complaint rule and the well-pleaded complaint rule. *See, e.g.*, Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J., 273, 282-83 (1993) (arguing that federal preemption is always a defense and therefore cannot support jurisdiction under a strict application of the well-pleaded complaint and master of the complaint rules); Eric J. Moss, Note, *The Breadth of Complete Preemption: Limiting the Doctrine to Its Roots*, 76 Va. L.

This doctrine originated in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 1261 (1968). Plaintiff sued a union and its members in state court to enjoin a strike at its plant. It alleged that it had a valid contract with the union that prohibited all work stoppages and that the defendants nonetheless had sanctioned work stoppages in violation of the agreement. *Id.*, 390 U.S. at 558, 88 S. Ct. at 1236. Thus framed, the complaint appeared to sound solely in state contract law. Nonetheless, the Court affirmed the removal of the case on federal question grounds. It reasoned that the contract at issue was a collective bargaining agreement governed exclusively by a provision of federal law, § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and that a claim under that agreement necessarily arose under federal law. *Id.*, 390 U.S. at 559-60, 88 S. Ct. at 1237. The Court subsequently has explained its decision in *Avco* as a function of the powerful preemptive force of Section 301 and the consequent conversion of the plaintiff's purported state law cause of action to one governed by federal law.

> The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Bd., 463 U.S. at 23-24, 103 S. Ct. at 2853-54 (footnote omitted).

Franchise Tax Board emphasizes, however, that the "independent corollary" developed in *Avco* does not apply in all cases of federal preemption, but only where the allegedly preempted state cause of action described in the complaint can be recharacterized as a federal claim. The plaintiff in *Franchise Tax Board* filed suit to collect on state tax levies against funds held in trust under an ERISA-covered benefit plan. *Id.*, 463 U.S. at 4-6, 103 S. Ct. at 2844-45. The plan and its trustees removed the case to federal court, contending that ERISA's preemptive force was analogous to that of § 301 of the LMRA, thereby converting the plaintiff's claim to one arising under federal law. *Id.*, 463 U.S. at 22-24, 103 S. Ct. at 2853-54. The Court, after explaining the holding of *Avco* in the language quoted above, rejected the defendant's argument and ordered that the case be dismissed for lack of subject matter jurisdiction. *Id.*, 463 U.S. at 25-26, 103 S. Ct. at 2855. In reaching this result, the Court commented that, unlike § 301, "ERISA does not provide an alternative cause of action in favor of the State to enforce its rights. . . . " *Id.*, 463 U.S. at 26, 103 S. Ct. at 2855. In other words, the plaintiff's state law claim, even if it might be defeated by application of federal law, could not be

---

Rev. 1601, 1612-13 (1990) (asserting that the jurisdictional rules developed in the complete preemption cases make "a substantial departure from the established well-pleaded complaint rule"). The Court never has acknowledged any contradiction, however, and consistently has characterized the rule developed in the complete preemption cases as a "corollary," not an exception. *Caterpillar*, 482 U.S. at 393, 107 S. Ct. at 2430; *Franchise Tax Bd.*, 463 U.S. at 22, 103 S. Ct. at 2853; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55 (1987).

recharacterized into a federal claim (since no such federal claim existed) and hence was not removable.[14]

Two 1987 opinions reconfirmed that the "independent corollary" of *Avco* applies only when the state law cause of action has been displaced by a claim governed by federal law. In the first of the two decisions, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987), a former General Motors employee brought suit in state court, purportedly under state law, asserting that he had been denied disability benefits improperly and that he had been terminated from his employment wrongfully. *Id.*, 481 U.S. at 60-61, 107 S. Ct. at 1545. The defendants removed the case to federal court, asserting that the plaintiff's claim for disability benefits necessarily arose under federal law because the disability benefit plan from which he sought recovery was governed by ERISA. *Id.*, 481 U.S. at 61-62, 107 S. Ct. at 1545. The Court held that removal was proper. First, it noted that under *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) the plaintiff's state law cause of action for recovery of plan benefits was preempted by ERISA. *Id.*, 481 U.S. at 62, 107 S. Ct. at 1546. Although ERISA preemption, without more, would not "convert a state claim into an action arising under federal

---

[14] The plaintiff in *Franchise Tax Board* also sought a declaratory judgment concerning its right to levy against plan assets given the trustees' assertion that ERISA prevented them from honoring such levies. *Id.* 463 U.S. at 6-7, 103 S. Ct. at 2845. The Court, in reliance upon *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950), and *Gully v. First Nat'l Bank in Merdian*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936), determined that the declaratory judgment action did not arise under federal law and therefore ordered that it be dismissed as well. 463 U.S. at 20-22, 103 S. Ct. at 2852-53.

law," *id.*, 481 U.S. at 64, 107 S. Ct. at 1547, the Court determined that Taylor's claim had been so converted because it fell directly under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which provides an exclusive federal cause of action for resolution of disputes regarding benefits due from an ERISA-covered plan. 481 U.S. at 62-63, 66, 107 S. Ct. at 1546, 1548.

The Court reached a different jurisdictional result in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987), decided only two months after *Metropolitan Life*, because the state law cause of action in that case could not be recharacterized into one arising under federal law. Several former Caterpillar employees sued under state law for breach of individual employment contracts. *Id.*, 482 U.S. at 390, 107 S. Ct. at 2428. Defendants responded that the claims in fact were governed by a collective bargaining agreement and therefore arose under § 301 of the LMRA, as had the claims in *Avco*. On that basis defendants sought to remove the case. *Id.* The Court rejected that attempt because plaintiffs had asserted claims that, unlike the claims at issue in *Avco*, were founded upon individual employment agreements, not a collective bargaining agreement. 482 U.S. at 394-97, 107 S. Ct. at 2430-32. Hence, while those claims might be subject to a defense under federal labor law, they could not be recharacterized as "artfully pleaded" federal claims – i.e., the state law claims asserted in the complaint had not been displaced by a body of federal law. 482 U.S. at 396-97, 107 S. Ct. at 2431-32.

These four cases establish that a plaintiff, even though master of his complaint, cannot avoid federal jurisdiction by invoking a non-existent body of state law. As Judge Easterbrook of the Seventh Circuit has commented, "Sometimes . . . federal law so fills every nook

and cranny that it is not possible to frame a complaint under state law." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1075 (7th Cir. 1992). When presented with "a federal case in state wrapping paper," *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986) (Posner, J.), the defendant must be given the option to remove it, for "[a]ny other approach allows crafty drafting to defeat the statutory right to remove." *Bartholet*. These principles, while they have been generated primarily in cases involving preemption issues, apply whenever federal law has displaced that of a state, including, as will be discussed below, displacement by a federal judgment on a matter of federal law.

2. *Moitie* Authorizes Removal When A State Claim Can Be Recharacterized As a Federal Claim By Virtue Of the Claim Preclusive Effect of A Prior Federal Judgment on a Matter of Federal Law

While the instant case does not involve any preemption issues, it does concern a state law claim that, in respondents' view, is precluded by the unappealed 1986 bankruptcy court orders issued pursuant to 11 U.S.C. § 363(f). The complete preemption cases discussed in the preceding section – *Avco, Franchise Tax Board, Metropolitan Life* and *Caterpillar* – therefore are not controlling. Nonetheless, they are instructive, for they suggest that the propriety of removal in this case, or indeed in any case involving "artful pleading," depends upon whether the plaintiffs' purported state law claim can be recharacterized as a federal claim, albeit one in "state wrapping paper." *Graf*.

This Court has addressed a similar issue only once before. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394,

101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). In *Moitie* a federal district court dismissed seven parallel civil actions that had been brought against various department stores by certain of their retail customers, who sought treble damages for alleged price fixing. *Id.*, 452 U.S. at 395-96, 101 S. Ct. at 2426. The district court based its dismissal on plaintiffs' failure to allege "injury" to their "business or property" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15. *Id.*, 452 U.S. at 396, 101 S. Ct. at 2426-27. Plaintiffs in five of the seven suits appealed to the Ninth Circuit, which ultimately reversed the district court's judgment because of this Court's intervening decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979), holding that retail purchasers can suffer injury to their business or property for purposes of § 4 of the Clayton Act. *Id.*, 452 U.S. at 396-97, 101 S. Ct. at 2427. Plaintiffs in the two other suits, however, opted to forego their appeals and instead filed new actions in California state court in which, based upon the identical facts alleged in the dismissed federal suits, they asserted causes of action purporting to arise solely under state law. *Id.*, 452 U.S. at 396, 101 S. Ct. at 2427.

The defendants removed the two state court cases and sought to have them dismissed on res judicata grounds, the judgment of dismissal in the prior federal actions by then having become final. *Id.* The district court denied the plaintiffs' motion to remand, reasoning that the claims brought in the removed actions were "essentially federal," and it dismissed the removed actions as barred by res judicata. *Id.*, 452 U.S. at 396-97, 101 S. Ct. at 2427. The court of appeals reversed, affirming the district court's jurisdictional holding but disagreeing with its "strict application" of res judicata. *Moitie v. Federated Dept. Stores, Inc.*, 611 F.2d 1267, 1269-70 (9th Cir. 1980).

This Court granted certiorari "to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata." *Moitie*, 452 U.S. at 398, 101 S. Ct. at 2427.[15] In the process, however, it commented in a footnote upon the propriety of removing a state court action that on its face presented only state law claims for decision. Because that footnote is central to the resolution of the instant case, it is quoted below in full.

> The Court of Appeals also affirmed the District Court's conclusion that *Brown* II [one of the two state court actions that had been removed and the only one still pending at the time of the Court's decision] was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims. We will not question

[15] The Court ultimately rejected the exception as "an unprecedented departure from accepted principles of res judicata" and reversed the Court of Appeals. *Id.*, 452 U.S. at 399, 101 S. Ct. at 2428.

> here that factual finding. See *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (NDNY 1964); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (EDNY 1980); *Three J Farms, Inc. v. Alton Box Board Co.*, 1979-1 Trade Cases ¶ 62,423 (SC 1978), rev'd on other grounds, 609 F.2d 112 (CA4 1979), cert. denied, 445 U.S. 911, 100 S. Ct. 1090, 63 L. Ed. 2d 327 (1980).

Id., 452 U.S. at 397 n. 2, 101 S. Ct. at 2427 n. 2.

The Court did not explain what gave the state court actions in *Moitie* their "federal character," but the authorities cited in the footnote demonstrate that the key issue, as in the preemption cases, is recharacterization – is the purported state law claim one that necessarily arises under federal law? The Wright and Miller section cited in the *Moitie* footnote, for example, asks whether "the real nature of the claim is federal, regardless of plaintiff's characterization" and, in the very next sentence, clarifies that general pronouncement:

> [I]n many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not.

14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3722 (1976), at 564-66.[16]

Consistently with this overarching principle, the courts in *In re Wiring Device* and *Three J Farms*, two of the three district court cases cited in the *Moitie* footnote, recharacterized state law claims that in fact were governed exclusively by federal law. In both cases plaintiffs alleged that activity in interstate commerce had violated

[16] This passage has been carried forward verbatim in the second edition of the Wright and Miller treatise. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3722 (2d ed. 1985), at 266-73.

South Carolina's antitrust law, which previously had been construed by that state's highest court to apply only to purely intrastate commerce. Hence no state law claim existed in those cases; the plaintiffs' antitrust claims could arise only federal law. *Wiring Device*, 498 F. Supp. at 83; *Three J*, 1979-1 Trade Cas. (CCH) ¶ 62,423 at 76,550.[16] Similarly, the complaint in the third cited decision, *Prospect Dairy*, while it referred expressly only to New York tort law, tracked the language of both the Sherman Act and § 303 of the LMRA, 29 U.S.C. § 187, and asserted violations of "such other provisions of law, both under federal and state mandate, applicable thereto." *Prospect Dairy*, 237 F. Supp. at 178. It thus could be, and apparently was, viewed as a case in which the plaintiff in fact had asserted federal claims, however vaguely and inarticulately. *Id.* at 178-79.

The *Moitie* footnote, viewed in light of the cited authorities, thus can be seen as a precursor of the preemption cases (all of which, save for *Avco*, were decided after *Moitie*) and their "independent corollary" to the well-pleaded complaint rule, for removal jurisdiction in both *Moitie* and the preemption cases hinges on the recharacterization of a purported state law claim that in fact is necessarily federal. In *Avco* and *Metropolitan Life* the plaintiff's state law claims had been displaced (and replaced) by federal claims due to the "powerful" preemptive force of § 301 of the LMRA and § 502(a)(1)(B) of

---

[16] California law, unlike South Carolina law, can reach transactions in interstate commerce. *See Younger v. Jensen*, 26 Cal. 3d 397, 405, 605 P.2d 813, 818, 161 Cal. Rptr. 905, 910 (1980). Thus the jurisdictional holding in *Moitie* must be based upon principles broader than those implicated by the interstate reach of the plaintiffs' allegations.

ERISA respectively, thus warranting removal. *Metropolitan Life*, 481 U.S. at 63-67, 107 S. Ct. at 1546-48; *Avco*, 390 U.S. at 559-60, 88 S. Ct. at 1237. The recharacterization in *Moitie* stems from a different, but equally powerful, doctrine, that of res judicata or, as it now is often called, claim preclusion.

The doctrine of res judicata, as the Court stated in *Moitie* itself, is "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . . " *Moitie*, 452 U.S. at 401, 101 S. Ct. at 2429, (*quoting Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 507, 61 L. Ed. 1148 (1917)). A final judgment on the merits of an action precludes the parties and their privies from relitigating issues that were or could have been raised in that action. *Moitie*, 452 U.S. at 398, 101 S. Ct. at 2428. This Court, the lower federal courts and the Restatement (Second) of Judgments all have described the preclusive effect of a final judgment in terms of "merger" and "bar." In the context of a class action, for example, this Court has stated,

> Basic principles of res judicata (merger and bar or claim preclusion) . . . apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim.

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S. Ct. 2794, 2798, 81 L. Ed. 2d 718 (1984); *see also Waid v. Merrill Area Pub. Schools*, 91 F.3d 857, 863 (7th Cir. 1996) (defining "merger" and "bar" similarly); *Finley v. United States*, 612 F.2d 166, 170 (5th Cir. 1980) (all causes of action that could have been, but were not, raised in the earlier proceeding "are considered to have merged into

the prior judgment"); Restatement (Second) of Judgments §§ 18-19, 24 (1982).

The "merger" and "bar" effects of a final judgment lie at the core of *Moitie's* jurisdictional holding. The federal judgment in *Moitie* had extinguished any state claim by operation of the doctrine of merger; the state claim "merged into the federal judgment and disappeared, leaving nothing on which to base a suit in state court." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 612 (7th Cir. 1997) (Posner, J.). Merger thus effects a recharacterization of the purported state claims into federal ones.

> [W]e can recharacterize a state claim barred by the res judicata effect of a federal judgment as an artfully pleaded federal claim. The federal judgment would ordinarily preclude the plaintiff from relitigating any federal or state claim arising out of the same operative facts. *A purported state claim based on those facts would be in effect the same federal claim against which the judgment had been entered.* The removing court could thus recharacterize the state claim as an artfully pleaded federal claim filed to circumvent the res judicata effect of the federal judgment.

Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1376 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S. Ct. 150, 98 L. Ed. 2d 106 (1987) (emphasis supplied and citations omitted); *accord, Carpenter*, 44 F.3d at 370; *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993). If the prior federal judgment sounds in federal law, then the artfully pleaded state claim can be recharacterized as a removable federal claim. *Carpenter; Ultramar Am., Ltd. v. Dwelle*, 900 F.2d 1412, 1415-16 (9th Cir. 1990).

"Artful pleading," as that term is used in both the *Moitie* footnote and in the complete preemption cases,

Caterpillar, 482 U.S. at 396-97, 107 S. Ct. at 2431-32, refers to a plaintiff's attempt to characterize a necessarily federal claim in state law terms. In *Moitie* the prior federal antitrust judgment rendered the later-filed state claims literally non-existent, for they had merged into the federal judgment. Just as § 301 of the LMRA and § 502 of ERISA rendered federal the purported state claims in *Avco* and *Metropolitan Life*, the prior federal judgment in *Moitie* rendered federal (and hence removable) any subsequent purported state claim based upon the same facts.[17]

The Fifth Circuit, in its decision below, correctly interpreted *Moitie* to allow the removal of a state cause of action completely precluded by a prior federal judgment on a question of federal law. *Rivet*, 108 F.3d at 586; Jt. App. 64. It remains only to determine whether the rule applies when, as here, the prior federal judgment was generated not in an ordinary civil action, but in a bankruptcy proceeding in which the current plaintiffs participated as creditors.

---

[17] Petitioners' insistence throughout their brief that respondents have based removal of this case on an affirmative defense misses the point altogether. Respondents agree that federal defenses cannot justify removal of a case founded entirely upon state law, but that is not the issue presented for review. Rather, all of the petitioners' claims involving the effect of their mortgage upon the Leasehold Estate merged into the prior bankruptcy court orders, which were not appealed. It is the recharacterization of petitioners' claims as federal by virtue of this merger, in accordance with *Moitie* and the Court's other artful pleading cases and in light of the bankruptcy court orders, that makes them removable. *See infra* at 31-32, 39-47.

3. The Jurisdictional Rule of *Moitie* Applies in the Instant Case

The federal orders upon which respondents rely to support removal were generated in the context of a contested proceeding in bankruptcy. The trustee filed an application pursuant to 11 U.S.C. § 363(f) to sell certain property of the debtor's estate, including the Leasehold Estate, free and clear of all liens and mortgages. The bankruptcy court set a deadline for creditors to file objections to the sale application and set a hearing date on any objections that might be filed. Jt. App. 10. The Mirannes appeared through counsel at the hearing,[18] held as a contested matter under Fed. R. Bankr. P. 6004 and 9014. Jt. App. 12. At the hearing the court, in deciding whether to grant the trustee's motion in the face of what apparently was opposition from the Mirannes, necessarily had to determine whether the Mirannes' Second Mortgage would continue to encumber the Leasehold Estate after it was sold. The court determined that it would not. Jt. App. 12-13, 18.

The Mirannes, who appeared in the bankruptcy court as creditors objecting to the trustee's motion, appear in the instant proceeding as plaintiffs. Thus, although the claim regarding the continued impact of the Mirannes' mortgage on the Leasehold Estate necessarily was resolved in the bankruptcy proceeding (and resolved adversely to the Mirannes), the alignment of the parties in that proceeding appears, at least on the surface, to differ somewhat from their alignment here. Those

---

[18] The bankruptcy court order reflects that Edmond G. Miranne, Jr. appeared as counsel for himself and his father, but does not mention their wives. The order nonetheless is binding on the wives. *See infra* at Section II(A)(3), pp. 43-45.

differences, however, are more apparent than real and in any event are not determinative of removal jurisdiction.

Under the Bankruptcy Rules it is the objection to a proposed sale, not the application for the sale, that triggers the contested proceeding. More specifically, Fed. R. Bankr. P. 6004(b) provides that an objection to a proposed sale of property of a debtor is governed by Fed. R. Bankr. P. 9014, which prescribes the procedure to be followed in contested matters. Hence, in objecting to the sale the Mirannes' position was analogous to that of the plaintiffs in an ordinary civil action, the same position that they occupy in the instant case.

In any event, whatever differences there arguably may be in the parties' alignment are of no importance for jurisdictional purposes, petitioners' contentions to the contrary notwithstanding. *See* Pet. Brief 29-30. In the bankruptcy proceeding petitioners asserted that they had a valid mortgage against the property that the trustee wished to sell and litigated whether, under 11 U.S.C. § 363(f), their Second Mortgage would survive the public sale. They lost. They now seek to foreclose upon the same mortgage. However, once a federal bankruptcy court has determined whether a secured lender can realize on its collateral at all, a determination that is of the very essence of what federal bankruptcy courts do, the secured lender has no further claims remaining with regard to that security. The current suit therefore is precluded by the bankruptcy court orders, never appealed,[19] and can be recharacterized, per *Moitie*, as a reenactment of the contested proceeding generated by the Mirannes' objection in the bankruptcy court, albeit a reenactment in state

---

[19] The claim preclusive effect of the bankruptcy court orders is discussed in more detail *infra* at Section II, pp. 39-47.

law garb. Thus recharacterized, the Mirannes' state court claim arises under federal law and is removable, just as were the state court claims in *Moitie*.

C. The Jurisdictional Principles Derived from *Moitie* Further the Policies Served By the Statutory Grant of Federal Question Jurisdiction, While Simultaneously Respecting the Competence and Sovereignty of State Courts

This Court has interpreted the statutory grant of federal question jurisdiction "with an eye to practicality and necessity." *Franchise Tax Bd.*, 463 U.S. at 20, 103 S. Ct. at 2852. In so doing, it has devised jurisdictional standards consistent with "the demands of reason and coherence, and the dictates of sound judicial policy. . . . " *Romero*, 358 U.S. at 379, 79 S. Ct. at 484. The jurisdictional principles derived from *Moitie*, as articulated above, satisfy these requirements. They provide a narrowly tailored set of rules that can be applied easily, that further the purposes of federal question jurisdiction and that simultaneously respect the competence and sovereignty of the state courts.

Federal question jurisdiction promotes uniform application and interpretation of federal laws. *See* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 4 (1969) ("[F]ederal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy"); Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L. Rev. 927, 948 (1996). Federal question removal jurisdiction complements the parallel grant of original jurisdiction by

providing defendants with a forum for the protection of federal rights. *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 246, 90 S. Ct. 1583, 1590, 26 L. Ed. 2d 199 (1970). In light of these general policy considerations the Court, in deciding controversies concerning the extent of federal question jurisdiction, has viewed the nature of the federal interest at stake in any given case as of primary importance. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 n. 12, 106 S. Ct. 3229, 3235 n. 12, 92 L. Ed. 2d 650 (1986).

Cases falling within the scope of *Moitie*'s jurisdictional rule implicate quite significant federal interests, in terms of both the uniform interpretation of federal law and the integrity of the federal court system. In such cases the federal court already has considered and determined an issue of federal law and embodied that determination in a judgment having claim preclusive effect. Often the federal issues that are the subject of the judgment fall within a field in which the federal courts have a special expertise and interest, such as bankruptcy, the area of federal law at issue here, *see* U.S. Const., Art. I, Sect. 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"); *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995), and antitrust law, the area at issue in *Moitie*. *See* 15 U.S.C. § 15(a) (granting federal district courts exclusive jurisdiction over treble damages actions brought pursuant to the federal antitrust laws). When the losing party seeks to relitigate the already-decided federal issue by disguising its claim in state clothing, it undermines the interest in uniform interpretation of federal law and, perhaps even more importantly, manipulates the dual

system of federal and state courts in a manner that undermines the integrity of federal mandates and damages the very federalism that petitioners claim to champion. *See* Pet. Brief 19, 22-23, 30-32.

Federalism is founded upon "a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44, 91 S. Ct. 746, 750, 27 L. Ed. 2d 669 (1971). Proper respect for state functions, however, does not require a federal court, having already ruled on a matter of federal law, to ignore the losing party's attempt to raise the same claims anew, albeit in disguise, in a state court system. To the contrary, federalism requires sensitivity to the legitimate interests of the national government as well. *Id.* Among those interests is the protection of federal judgments from collateral attack in state court by artful manipulation of pleadings. *See Deauville Associates, Inc. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir. 1950); *Nowling v. Aero Services Int'l, Inc.*, 734 F. Supp. 733, 737 (E.D. La. 1990).

A plaintiff who seeks to relitigate federal issues already determined by a federal court has no state claims left, regardless of the characterization that he gives to his claims, for all state issues already have been merged into the federal judgment. *See Brand Name Prescription Drugs*, 123 F.3d at 612; *Carpenter*, 44 F.3d at 366-67, 370. The state's interest in such a controversy is minimal at best, and removal under those circumstances hardly does violence to the interests of federalism. Indeed, removal under *Moitie* is a less intrusive alternative under these circumstances to a remedy already authorized by Congress, an injunction under the relitigation exception to the

Anti-Injunction Act, 28 U.S.C. § 2283.[20] A federal court that enjoins a state court from proceeding intrudes deeply into the workings of state government, yet Congress has authorized federal courts to issue such orders when necessary to protect a federal court judgment. By comparison, removal of a case from state court works automatically, shifting the case smoothly and without disruption from one court system to another upon the filing of a notice of removal.[21] *See* 28 U.S.C. § 1446. Hence petitioners' assertion that *Moitie*, as interpreted by the Fifth Circuit below, would "entail an enormous expansion of federal jurisdiction," Pet. Brief 30, is rhetoric without substance.

Moitie, like the Court's other artful pleading cases, authorizes removal in certain narrow circumstances because in those circumstances the plaintiff's claim is necessarily federal, no matter how plaintiff seeks to characterize it. Removal of such a necessarily federal claim is consistent with the jurisdictional policies of 28 U.S.C. §§ 1331 and 1441, promotes substantial federal interests concerning the integrity of the federal court system and its judgments and minimizes any adverse impact upon

---

[20] 28 U.S.C. § 2283 provides in relevant part,

> A court of the United States may not grant an injunction to stay proceedings in a State court except . . . to protect or effectuate its judgments.

[21] It should be noted that injunctions under the relitigation exception to the Anti-Injunction Act are available in several circumstances not covered by *Moitie*. For example, an injunction could issue when the prior judgment has no federal law component or in cases presenting issue preclusion, but not claim preclusion. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150-51, 108 S. Ct. 1684, 1691-92, 100 L. Ed. 2d 127 (1988). *Moitie* does not apply in either of these circumstances.

the state's parallel court system. The jurisdictional rule of *Moitie* is thus consistent with the demands of reason, coherence and sound judicial policy. *Romero*. The Court should reaffirm its continued vitality.

D. The Determination of Subject Matter Jurisdiction Often Requires Consideration of the Merits

Petitioners posit that *Moitie*, as interpreted by the Fifth Circuit in the instant case, creates a logical conundrum by requiring a federal court to review an aspect of the merits of a removed case, namely whether it is barred by res judicata, to determine if it has subject matter jurisdiction in the first place. Pet. Brief 33-35. In creating this straw man, petitioners wrongly suggest that jurisdictional determinations in all other types of cases can be separated clearly from consideration of the merits.

This Court's jurisprudence is replete with counterexamples, perhaps the most analogous coming from *Moitie*'s cousins, the complete preemption decisions. In determining in *Franchise Tax Board*, for example, that the case before it did not arise under ERISA and hence had been removed improvidently, the Court had to consider an important aspect of the case's merits – whether ERISA preempted the state law claims found in the complaint – an issue it ultimately decided favorably to the plaintiff. *Id.*, 463 U.S. at 24-27, 103 S. Ct. at 2854-55. Indeed, in any case involving the "complete preemption corollary to the well pleaded complaint rule," *Caterpillar*, 482 U.S. at 393, 107 S. Ct. at 2430, the court must decide a merits issue, federal preemption of plaintiff's state law claims, to determine its jurisdiction. *See, e.g., id.*, 482 U.S. at 394-96, 107 S. Ct. at 2430-31; *Avco*, 390 U.S. at 559-60, 88 S. Ct. at 1237 (determining first that plaintiff's state law claims

were completely preempted and concluding from this that the district court had jurisdiction over the case); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (court had to conclude that allegations of complaint fell under ERISA to determine propriety of removal).

Similar examples abound outside the preemption context. Where a removing defendant alleges that the plaintiff has fraudulently joined a non-diverse defendant to prevent removal, a federal court can look beyond the complaint to the merits of the claim against that defendant to determine whether jurisdiction exists.

> If . . . a non-resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions.

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144 (1921); *see also Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996) (court should employ a summary judgment-like procedure to resolve fraudulent joinder contentions); *Faucett v. Ingersoll-Rand Min. & Mach. Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992) (fraudulent joinder established by affidavit absolving non-diverse defendant of liability). Courts likewise must consider the merits of a plaintiff's complaint to determine whether the amount in controversy meets jurisdictional requirements. *E.g., Gibbs v. Buck*, 307 U.S. 66, 72, 59 S. Ct. 725, 729, 83 L. Ed. 1111 (1939) ("If there were any doubt of the good faith of the allegations [of the amount in controversy], the court might have called for their justification by evidence"); *McNutt v. General Motors Acceptance Corp. of Indiana*, 298

U.S. 178, 184, 56 S. Ct. 780, 783, 80 L. Ed. 1135 (1936). Subject matter jurisdiction and merits issues also can overlap substantially in cases involving sovereign immunity, *Land v. Dollar*, 330 U.S. 731, 739, 67 S. Ct. 1009, 1013, 91 L. Ed. 1209 (1947) ("the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits"), and the "in commerce" jurisdictional requirement of the antitrust laws. *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 201 n. 19, 95 S. Ct. 392, 402 n. 19, 42 L. Ed. 2d 378 (1974) (noting identity of jurisdictional issues and certain issues on the merits); *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733-34 (9th Cir. 1979) ("if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits").

Moitie's narrow and limited scope requires far less intrusive "merits" review than is mandated when, for example, a claim of fraudulent joinder is raised in a diversity action. In the latter, evidence in the form of affidavits (dealing with the fraudulently joined party's job, scope of responsibility or activities) often must be presented to the court to be considered in ruling on the issue; in *Moitie*, as here, the only items of "evidence" to be considered are prior court orders and pleadings. The Fifth Circuit's opinion therefore is not, as the petitioners claim, an aberration; rather, it is merely the latest in a long line of similar decisions, many of them from this Court, recognizing that in certain limited circumstances jurisdiction and "merits" issues are intertwined and must be considered together. The fact that a mixed question of jurisdiction and merits occurs in this limited context does not warrant any retreat from the jurisdictional principles enunciated in *Moitie*.

II. Petitioners' Claims Are Barred By the Preclusive Effect of the Bankruptcy Court Sale Orders

A. All of the Elements of Res Judicata Are Satisfied In This Case

The doctrine of res judicata serves "vital public interests," *Moitie*, 452 U.S. at 401, 101 S. Ct. at 2429, namely " 'that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' " *Id.* (*quoting Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525, 51 S. Ct. 517, 518, 75 L. Ed. 1244 (1931)). A final judgment on the merits of an action by a court of competent jurisdiction precludes the parties and those in privity with them from relitigating issues that were or could have been raised in that action. *Id.*, 452 U.S. at 398, 101 S. Ct. at 2428; *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995); *Israel Discount Bank, Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992). Each of these elements is present here, establishing both that the district court properly exercised removal jurisdiction over this case under *Moitie* and that it properly dismissed petitioners' claims as barred by the prior bankruptcy court orders.

1. The Bankruptcy Court Orders Constitute Final Judgments for Claim Preclusion Purposes

The normal rules of res judicata apply to the decisions of bankruptcy courts. *Katchen v. Landy*, 382 U.S. 323, 334, 86 S. Ct. 467, 475, 15 L. Ed. 2d 391 (1966). Final appealable orders of the bankruptcy court therefore are entitled to preclusive effect. *Id.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375-77, 60 S. Ct. 317, 319-20, 84 L. Ed. 329 (1940). Orders confirming the

sale of property of a debtor's estate fall within this category. *Hendrick v. Avent*, 891 F.2d 583, 586 & nn. 6-7 (5th Cir.), *cert. denied*, 498 U.S. 819, 111 S. Ct. 64, 112 L. Ed. 2d 39 (1990); *Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1016 (7th Cir. 1988), *cert. denied sub nom. Gekas v. Pipin*, 490 U.S. 1006, 109 S. Ct. 1642, 104 L. Ed. 2d 157 (1989).

2. The Bankruptcy Court Had Jurisdiction to Issue the Sale Authorization and Confirmation Orders

Congress granted "comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. . . . " *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995) (*quoting Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)). District courts have jurisdiction under 28 U.S.C. § 1334 over cases arising under, arising in or related to cases under Title 11. A proceeding to sell property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f) is a core proceeding in which the bankruptcy court has jurisdiction to issue final orders and judgments. 28 U.S.C. § 157(a), (b)(1), (b)(2)(N); *In re Heine*, 141 B.R. 185, 187-88 (Bankr. D.S.D. 1992). More particularly, the THILP bankruptcy court had jurisdiction to take cognizance of and decide disputes concerning the proposed sale of the property that was subject to the Mirannes' mortgage. *See Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1206 (5th Cir. 1988) (jurisdiction is "the authority by which courts and judicial officers take cognizance of and decide cases").

Petitioners nonetheless suggest that the bankruptcy court lacked the power to issue the sale orders in the

THILP bankruptcy because, in their view, the court followed the wrong procedure, allowing the trustee to proceed via bankruptcy motion practice under Fed. R. Bankr. P. 9014 instead of by adversary proceeding under Fed. R. Bankr. P. 7001, *et seq.* That suggestion confuses jurisdictional defect with procedural error and is, in any event, an incorrect construction of the Bankruptcy Rules.

Jurisdiction connotes the authority by which a court may hear and decide cases. *Amoco Prod. Co.* Petitioners appear to concede that bankruptcy courts have the authority to hear and decide disputes concerning whether property of a debtor should be sold free and clear of encumbrances. Instead they question whether the bankruptcy court, by failing to require the trustee to institute an adversary proceeding, correctly exercised that authority. Those are matters of bankruptcy procedure, not of jurisdiction, and should have been raised either by a timely appeal or by a motion for reconsideration, not by a collateral attack years after the fact. *Met-L-Wood*, 861 F.2d at 1016-18.

Moreover, even if a procedural defect under some circumstances somehow could be deemed jurisdictional, petitioners' argument still fails, for the Bankruptcy Rules specifically authorize the procedure that the bankruptcy court used here. Fed. R. Bankr. P. 6004(b) provides that any objection to the proposed sale of estate property is governed by Rule 9014, entitled "Contested Matters." While adversary proceedings are required "to determine the validity, priority or extent of a lien or other interest in property," Fed. R. Bankr. P. 7001(2), the validity, priority or extent of the Mirannes' lien never was placed before the bankruptcy court for decision. Instead that tribunal was asked to decide whether the property could be sold

free and clear of all liens, including petitioners', assuming all of those liens to be valid. That proceeding falls squarely within the ambit of Rules 6004(b) and 9014.[22]

Finally, petitioners for the first time challenge the adequacy of the notice with which they were provided and assert that inadequate notice of the sale proceeding may have deprived them of due process. This argument was not raised in either court below, nor was it raised in the petition for certiorari; accordingly, the Court should not consider it at all. Sup. Ct. R. 14.1(a), 24.1(a); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280 (1992). In any event, the argument is groundless. Petitioners apparently received actual notice of the bankruptcy hearing, as required by Fed. R. Bankr. P. 6004(a), for they entered an appearance at the hearing. Jt. App. 12. Having received actual notice and the opportunity to respond, petitioners suffered no violation of their due process rights. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950); *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246, 254 (2d Cir. 1995) (citing cases).

---

[22] Petitioners' citations to *In re Parrish*, 171 B.R. 138 (Bankr. M.D. Fla. 1994), and *In re Wing*, 63 B.R. 83 (Bankr. M.D. Fla. 1986), are inapposite. The court in *In re Wing* commented that "the extent of a creditor's right or interest in estate property" must be determined in an adversary proceeding, 63 B.R. at 85, a proposition that is correct, but irrelevant here, where the extent of the Mirannes' pre-sale lien never was placed at issue. *In re Parrish* involved a sale without notice to the lienholder, whose lien therefore survived the sale. It has no application here, where petitioners actually appeared at the hearing that resulted in the sale authorization.

3. All of the Petitioners Were Either Parties to, or in Privity With Parties to, the Bankruptcy Proceeding

Petitioner Edmond G. Miranne, Jr. appeared at the bankruptcy court hearing on the proposed sale. The court's order states that his appearance was on behalf of himself and his father, who is also one of the petitioners, but makes no reference to the wives, Rivet and Winer, the other two petitioners. Jt. App. 12. Nonetheless, the order is binding upon Rivet and Winer if their husbands adequately represented their interests before the bankruptcy court.[23] *Richards v. Jefferson County, Ala.*, ___ U.S. ___, 116 S. Ct. 1761, 1766, 135 L. Ed. 2d 76 (1996); *see also Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S. Ct. 115, 117-18, 85 L. Ed. 22 (1940).

The state court complaint alleges that petitioners "are the owners and holders" of a collateral mortgage note secured by an act of collateral mortgage.[24] R. 5 The collateral mortgage identified in the complaint was one of the

---

[23] Petitioners contend that despite the husbands' appearance at the hearing in the bankruptcy proceeding, not even they should be deemed parties to that proceeding. More particularly, they assert that because no adversary proceeding was held, the husbands "cannot be held to have knowingly participated as parties in any proceeding that they knew could have resulted in the cancellation of their mortgage. . . . " Pet. Brief 38. Petitioners have cited no legal or factual support for this novel proposition, which they did not raise in either court below and which therefore ought not be considered here. *Taylor v. Freeland & Kronz*, 503 U.S. at 645, 112 S. Ct. at 1649. In any event, the argument that creditors who actually participated in a bankruptcy hearing concerning the fate of their security somehow were not parties to that proceeding is facially absurd.

[24] For a discussion of the Louisiana collateral mortgage security package, *see* n. 2 *supra*.

encumbrances released by the bankruptcy court's "free and clear" sale orders. Jt. App. 12-13, 18, 23-28, 32. Under Louisiana law all four petitioners are considered to be co-owners of the obligation (if any) secured by the Second Mortgage, La. Civ. Code Ann. Art. 480, and as two of the four co-owners, the Miranne husbands can act on behalf of their wives in connection with their common property.[25] *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891, 892 (1920). Moreover, the interests of Rivet and Winer in the bankruptcy proceeding were identical to the interests of their husbands – the preservation and protection of the Second Mortgage. By their participation in the bankruptcy proceeding, the Miranne husbands attempted to preserve the Second Mortgage in furtherance of the common interest that they had with their wives with respect to the obligation secured thereby. As the trial court commented, "Plaintiffs do not even attempt to argue, and indeed it seems wholly implausible, that the Mirannes represented only their own interests at the bankruptcy hearing and not also their wives' interests in preserving and enforcing the Second Mortgage." Jt. App. 43. Under these circumstances, the husbands' participation in the bankruptcy proceeding is binding on the wives for res judicata purposes. *Eubanks v. Federal Deposit Ins. Corp.*, 977 F.2d 166, 170 (5th Cir. 1992); *Cotton v. Federal Land*

---

[25] The Fifth Circuit treated the collateral mortgage note as if it were community property under Louisiana law. 108 F.3d at 587; Jt. App. 67. Petitioners contend that they had opted out of Louisiana's community property regime. Pet. Brief 9 n. 8. The record is silent on this point. For present purposes only, respondents are willing to assume that petitioners had opted out of Louisiana's community property regime, which would make the four of them co-owners of the collateral mortgage note under La. Civ. Code Ann. art. 480.

Bank of Columbia, 676 F.2d 1368, 1370 (11th Cir.), *cert. denied*, 459 U.S. 1041, 103 S. Ct. 459, 74 L. Ed. 2d 610 (1982).[26]

4. Both the Bankruptcy Proceeding And the Instant Case Arise From A Common Nucleus of Operative Facts – the Viability and Enforceability of the Second Mortgage

For a later suit to be barred by a judgment entered in an earlier one, the same claim or cause of action must have been asserted in both cases. *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 2918, 77 L. Ed. 2d 509 (1983). While this Court has not settled upon a specific test for determining the identity of causes of action, *id.*, 463 U.S. at 130-31 & n. 12, 103 S. Ct. at 2918-19 & n. 12, the courts of appeals generally have adopted the transactional test of § 24 of the Restatement (Second) of Judgments (1982). *E.g., Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90-91 (2nd Cir. 1997); *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Matter of Baudoin*, 981 F.2d 736, 743 (5th Cir. 1993). To determine whether the same transactions are at issue in successive cases, courts must consider "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2)

---

[26] FSA and Regions were not parties to the bankruptcy proceeding. They are successors-in-interest to FFB with respect to the property that was the subject of the bankruptcy orders, however, and the orders therefore have preclusive effect as to them. *See Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990).

(1982). The determination is to be made pragmatically, with attention to the facts of each particular case. *Id.* & comment b.

Both the bankruptcy court sale orders and the petitioners' claims in the instant action are based upon the same set of facts – the viability and enforceability of the Second Mortgage. In 1986 the bankruptcy court authorized the sale of the debtor's property free and clear of the Second Mortgage. Petitioners now seek to foreclose upon, and to obtain damages for the alleged failure of respondents to heed their rights under, that very mortgage. Yet, as the Fifth Circuit stated below,

> Without an extant enforceable mortgage, the Mirannes cannot forthrightly plead either a right of action or a cause of action in state court. Indeed, all of the acts of alleged wrongdoing in the December 1993 transactions are so inextricably intertwined with and dependent on the 1986 bankruptcy orders directing and approving the sale of the leasehold estate free and clear of the second mortgage that we would be hard pressed to conjure up a better hypothetical example of two actions arising from the same nucleus of operative facts.

108 F.3d at 589; Jt. App. 71-72.

Petitioners' contention that their cause of action arises from occurrences subsequent to the sale orders ignores the obvious – their case rises (or, in respondents' view, falls) on the enforceability of the Second Mortgage. The 1993 transactions about which they complain in their state court pleadings are not actionable unless their Second Mortgage was enforceable against the Leasehold Estate at the time. The enforceability of the mortgage against the Leasehold Estate having been litigated before the bankruptcy court in 1986, it cannot be relitigated in a

lawsuit filed eight years later. Rather, a final bankruptcy sale "free and clear" bars any subsequent claims that challenge the finality or integrity of the transfer of title pursuant to that sale. *See La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 908 (7th Cir. 1990); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870-72 (5th Cir. 1984).

"The policies advanced by the doctrine of res judicata are at their zenith in cases concerning real property." *Nevada*, 463 U.S. at 129 n. 10, 103 S. Ct. at 2918 n. 10. Moreover, collateral attacks upon bankruptcy orders "seriously undercut[ ] the orderly process of the law." *Celotex*, 514 U.S. at 308, 115 S. Ct. at 1501; *see also Met-L-Wood*, 861 F.2d at 1019 ("Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms"). Petitioners lost their mortgage when the bankruptcy court's sale orders became final and non-appealable. The current action, being founded upon that mortgage, is barred.

B. The Continued Presence of the Petitioners' Mortgage on the Public Records of Louisiana Has No Bearing Upon the Claim Preclusive Effect of the Bankruptcy Court Orders

The bankruptcy court ordered that the trustee's sale proceed free and clear of the Second Mortgage. As an adjunct, it also ordered that the mortgage be canceled from Louisiana's public records. Nonetheless, the mortgage never has been canceled. In a final attempt to salvage their claims, petitioners posit that the continued presence of the mortgage on the public records somehow

has saved it from the ravages of § 363(f) of the Bankruptcy Code.[27]

The argument completely misconstrues Louisiana's public records doctrine. Recordation creates no rights or obligations, but simply notifies third parties of the rights and obligations that the contracting parties have created by their contract. *Phillips v. Parker*, 483 So 2d 972, 975 (La. 1986); *Coldwell Banker J. Wesley Dowling & Associates, Inc. v. City Bank & Trust of Shreveport*, 602 So.2d 1051, 1053 (La. App. 2d Cir. 1992).

> [R]ecordation does not purport to be and is not itself the source of rights. A recorded purchase from the legal owner transfers ownership to the purchaser, not because of the recordation, but because of the purchase. While the unrecorded purchase from the owner does not transfer ownership as far as third parties are concerned, a recorded purchase from one not the owner does not transfer ownership at all.

William V. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul. L. Rev. 491, 495 (1965).

In particular, recordation "is neither proof nor promise of the validity of the recorded or written instrument, which alone can be the source of the rights asserted." *Gulf South Bank & Trust Co. v. Demarest*, 354 So.2d 695, 697 (La. App. 4th Cir. 1978). Thus, the recordation of a forged document does not make the document valid. *Id.*, 354 So.2d at 697-98. Similarly, the continued presence of the

---

[27] This argument, like several others raised in petitioners' brief, was not raised in either the district court or the court of appeals and therefore ought not be considered by this Court either. *Taylor v. Freeland & Kronz*, 503 U.S. at 645-46, 112 S. Ct. at 1649.

Second Mortgage on the public records cannot undo the effect of the bankruptcy court's sale orders. *See First Guaranty Bank v. Alford*, 366 So.2d 1299, 1302-03 (La. 1978) (recorded mortgage does not create right to foreclose absent existence of an underlying obligation). Those orders authorized and confirmed a sale of the mortgaged property free and clear of the Second Mortgage, rendering the Second Mortgage ineffective as an encumbrance against the property from the sale date forward.

Petitioners' argument stands this structure on its head. According to them, the failure to cancel an ineffective encumbrance from the public records somehow brings it back to life. *See* Pet. Brief 43-49. That argument finds no support anywhere in Louisiana law and is refuted not only by the cases cited above, but by numerous others. *See*, e.g., *Matter of Zedda*, 103 F.3d 1195, 1206 (5th Cir. 1997); *Gibraltar Sav., F.A. v. First Mortg. Corp.*, 825 F. Supp. 746, 749 (M.D. La. 1993); *Camel v. Waller*, 526 So. 2d 1086, 1089-90 (La. 1988); *First Nat. Bank of Ruston v. Mercer*, 448 So. 2d 1369, 1376 (La. App. 2d Cir. 1984); *Lacour v. Ford Inv. Corp.*, 183 So.2d 463, 466 (La. App. 4th Cir. 1966), *writ dismissed*, 250 La. 459, 196 So.2d 275 (1967).

By virtue of the bankruptcy court orders, the Second Mortgage ceased to affect the Leasehold Estate once the trustee sold it. Those orders preclude the petitioners' claim, which depends upon the current enforceability of the Second Mortgage. Nothing in Louisiana's law of recordation can revive it.

CONCLUSION

For the foregoing reasons, the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, reported as *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir. 1997), should be affirmed.

Respectfully submitted,

CHARLES L. STERN, JR.*
Counsel for Respondent Fountainbleau Storage Associates
STEEG AND O'CONNOR, L.L.C.
201 St. Charles Ave., Suite 3201
New Orleans, Louisiana 70170
(504) 582-1199

JOHN M. LANDIS
STEPHANIE D. SHULER
Counsel for Respondent Regions Bank of Louisiana
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON, L.L.P.
546 Carondelet Street
New Orleans, Louisiana 70130-3588
(504) 581-3200

MICHAEL H. RUBIN
Counsel for Respondents Walter L. Brown, Jr. and Perry S. Brown
McGLINCHEY STAFFORD, a Professional Limited Liability Co.
One American Place, 9th Floor
Baton Rouge, Louisiana 70825
(504) 383-9000

**Counsel of Record*